

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Revisions to Electric Reliability Organization)	Docket Nos. RM12-6-000
Definition of Bulk Electric System and Rules)	RM12-7-000
of Procedure)	

**COMMENTS OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES**

Pursuant to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Notice of Proposed Rulemaking issued on June 22, 2012 (the “NOPR”),¹ the Massachusetts Department of Public Utilities (“Mass DPU”) hereby submits comments on the Commission’s proposal to approve the North American Electric Reliability Corporation’s (“NERC”) revisions to its definition of Bulk Electric System (“BES”) and Rules of Procedure (“ROP”).

I. INTRODUCTION

The Mass DPU has closely tracked the development of the proposed revisions to the BES definition and participated in the NERC standard development process.² Like our comments filed with NERC, the Mass DPU’s comments in this proceeding are guided by an appreciation of the need to address system reliability risks, while at the same time ensuring that any new costs imposed on consumers are supported by sound technical justifications and result in meaningful reliability benefits.

¹ *Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, 130 FERC ¶ 61,247 (June 22, 2012) (“NOPR”).

² In addition to the Mass DPU’s individual comments filed with NERC, all six New England states have participated in the NERC standard development process through the New England States Committee on Electricity (“NESCOE”). The Mass DPU worked with NESCOE on its comments filed today in this proceeding, and we agree with and support those comments.

The genesis of this NOPR traces back to an early interaction between the Commission and NERC as the newly-certified Electric Reliability Organization (“ERO”). In a 2007 order approving a multitude of NERC’s proposed reliability standards, the Commission also approved a proposed definition of the BES contained in NERC’s Glossary.³ The definition accorded regional reliability entities discretion in defining the BES, and the Commission, noting its concern regarding “the potential for gaps in coverage of facilities,” signaled that it would later revisit the BES definition.⁴

In 2010, the Commission found that the BES definition “failed to ensure that all facilities necessary for the operation of the interconnected transmission network are covered by” federal reliability standards.⁵ The Commission stated that the definition “allows broad discretion without ERO or Commission oversight,” resulting in “reliability issues.”⁶ Accordingly, through Order 743, the Commission directed NERC to revise the BES definition to ensure that the appropriate elements and facilities are captured by the definition and that the Commission’s technical and policy concerns are addressed.⁷

More specifically, Order 743 required NERC to adopt a uniform definition of the BES to eliminate “regional discretion and ambiguity.”⁸ While allowing NERC to develop an “equally effective alternative proposed approach,” the Commission recommended adoption of a 100 kV “bright-line” threshold, with appropriate exclusions, to address its concern regarding the current definition’s room for subjectivity and regional variation.⁹

³ NOPR at P 7, citing to *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 (2007) (“Order 693”), *order on reh’g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁴ *Id.* at P 8, quoting Order 693 at P 77.

⁵ *Revision to Electric Reliability Organization Definition of Bulk Electric System*, 133 FERC ¶ 61,150, at P 72 (2010) (“Order 743”), *order on reh’g*, 134 FERC ¶ 61,210 (2011) (“Order 743-A”).

⁶ *Id.*

⁷ *Id.* at P 1. *See* NOPR at P 9.

⁸ Order 743 at P 144.

⁹ *Id.* *See also id.* at PP 16, 72.

In Order 743-A, the Commission provided clarifications regarding the 100 kV threshold, including that the bright-line starting point was intended as a “first step or proxy” for classifying facilities as BES.¹⁰ The Commission further clarified that “local distribution facilities . . . must be excluded from the definition of the [BES]” and that NERC had discretion as the ERO to “develop criteria to determine how to differentiate between local distribution and transmission facilities in an objective, consistent, and transparent manner.”¹¹

In 2011, the NERC drafting team selected to develop the revised BES definition posted two drafts, approximately four months apart, for stakeholder comment. The New England States Committee on Electricity (“NESCOE”) provided comments on each draft on behalf of all six New England states.¹² The Mass DPU individually provided comments on the second draft definition circulated for comment and voted in the negative on both the initial ballot and the recirculation ballot.¹³ The Mass DPU also filed comments on NERC’s proposed changes to its ROP, which set forth the implementation of an exceptions process associated with the BES definition.¹⁴

On January 25, 2012, NERC filed with the Commission two petitions comprising one package of proposed reforms for complying with Order 743 and Order 743-A. Pursuant to

¹⁰ Order 743-A at PP 40, 67, 102-103. *See* NOPR at P 10.

¹¹ Order 743-A at PP 25, 58, 68. *See* NOPR at P 11.

¹² These comments are *available at* http://nescoe.com/uploads/Comments_BES_definition_final.pdf and http://nescoe.com/uploads/NESCOE_BES_comments_filed_version.pdf.

¹³ These comments are *available at* <http://www.mass.gov/eea/docs/dpu/regional-and-federal-affairs/ma-dpu-comments-on-2nd-draft-bes-oct07-2011.pdf>. Both NESCOE and the Mass DPU also filed comments on a standards authorization request for conducting a “Phase 2” of the BES definition. The Mass DPU’s comments on the proposed Phase 2 of the standard development process are *available at* <http://www.mass.gov/eea/docs/dpu/regional-and-federal-affairs/nerc-bes-definition-comments-feb03-2012.pdf>. We detail our concerns below regarding the bifurcation of this work into separate phases.

¹⁴ These comments are *available at* <http://www.mass.gov/eea/docs/dpu/regional-and-federal-affairs/ma-dpu-comments-on-rop.pdf>. NESCOE similarly filed comments on the ROP, and, months earlier, filed comments on the initially proposed exceptions procedure and the proposed technical criteria applicable to exceptions requests.

Section 215 of the Federal Power Act,¹⁵ the Commission proposes in the NOPR to approve two revisions that NERC requested: (1) a modified “core” definition of the BES that establishes a bright-line 100 kV threshold, with associated “inclusions” and “exclusions” of certain facilities or elements to provide additional granularity to the core definition,¹⁶ and (2) changes to the ROP that establish a case-by-case exception process by which facilities rated at 100 kV and above that are found not necessary for the reliable operation of interconnected transmission network could be removed from classification as BES while, conversely, appropriate sub-100 kV facilities could be designated as part of the BES.¹⁷

The Commission also proposes to approve NERC’s implementation plan for the revised BES definition,¹⁸ as well as NERC’s “Detailed Information to Support an Exception Request” form,¹⁹ which sets forth the technical criteria NERC will apply to such requests. Finally, the Commission proposes to require that NERC make an informational filing setting forth a plan for maintaining a list of facilities that have received exceptions through the ROP process.²⁰

II. COMMUNICATIONS

The Mass DPU requests that the individual identified below be placed on the Commission’s official service list in this proceeding and that all communications related to this filing and future filings in this proceeding should be directed to:

¹⁵ 16 U.S.C. §§ 824o(d), (f) (2006).

¹⁶ NOPR at P 48.

¹⁷ *Id.* at PP 50, 103.

¹⁸ *Id.* at P 120.

¹⁹ *Id.* at P 118.

²⁰ *Id.* at P 123.

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III. DESCRIPTION OF COMMENTER

The Commonwealth of Massachusetts is the largest state by population and load in New England.²¹ It comprises 46% of both the region's population and electricity consumption.²² Generating plants located in Massachusetts represent 41% of New England's capacity and our capital city, Boston, is the largest load center in the region.²³

The Mass DPU is the agency of the Commonwealth of Massachusetts charged with general regulatory supervision over gas and electric companies in Massachusetts and has jurisdiction to regulate rates and charges for the sale of electric energy and natural gas to consumers. Mass. Gen. Laws c. 164, § 76, et seq. Therefore, the Mass DPU is a "state commission" as defined by 16 U.S.C. § 796(15) and 18 C.F.R. § 1.101(k).

IV. COMMENTS

The Mass DPU, both individually and through NESCOE, has been an active participant in NERC's development of the proposed revisions to the BES definition and related changes to the ROP. The Mass DPU's comments do not address all areas covered by the NOPR. Rather, these comments are largely limited to significant gaps we have identified in the proposed

²¹ See U.S. Census Bureau, *2010 Census Results*, available at <http://2010.census.gov/2010census/data/>; ISO New England Inc., 2011 Regional System Plan at 28 (Table 3-1) ("2011 Regional System Plan").

²² ISO New England Inc., Massachusetts 2011-12 State Profile ("ISO-NE Massachusetts 2011-12 State Profile"), available at www.iso-ne.com/news/grid_mkts/key_facts/ma_12-2011_profile.pdf.

²³ ISO-NE Massachusetts 2011-12 State Profile; 2011 Regional System Plan at 32 (Table 3-3).

revisions. The Commission should require NERC to take additional action in these areas before issuing any final rule.

A. Revised BES Definition

1. Proposed Changes

The proposed core BES definition adopts the Commission’s approach of establishing a uniform 100 kV threshold as an “initial line of demarcation,”²⁴ subject to further refinement through a list of inclusions and exclusions and a backstop exception process that allows for individual facilities to be included or excluded from the BES. Consistent with Section 215 of the FPA, the core definition also excludes from the BES “facilities used in the local distribution of electric energy.”²⁵ The Commission seeks comment on the proposed BES definition to inform the Commission on what additional actions are necessary, such as “directing NERC to develop a further modification to the core definition, inclusions or exclusions[.]”²⁶

2. The Commission Should Ensure that Changes to the BES Definition are Supported by a Detailed Technical Analysis

The Mass DPU repeats its concern expressed during the standard development process that NERC fails to provide a technical justification for revisions to the BES definition. Due to time constraints in meeting the compliance deadline set in Order 743, NERC separated the development of the revised BES definition into two phases. Phase 1 culminated in the language of the proposed modified definition that is the primary subject of this NOPR. Phase 2, which is ongoing, intends to focus on other industry concerns “in a non-deadline environment,” including

²⁴ Order 743-A at P 40.

²⁵ NOPR at P 53. *See* 16 U.S.C. § 824o(a)(1)(B) (2006).

²⁶ NOPR at P 49.

determining if there is a technical justification for the 100 kV bright-line voltage level and the other threshold values incorporated in the definition's inclusions and exclusions.²⁷

The Mass DPU appreciates the time constraints under which NERC was required to finalize the development of the revised BES definition, as well as the Commission's need to set firms deadlines for addressing identified reliability risks. However, adopting the modified definition before the technical justifications are established may impose unnecessary consumer costs related to compliance with mandates based on threshold values that are ultimately found to be unsupported or in need of revision. NERC's approach should ensure that the Commission has sufficient information to determine that the proposal is "just, reasonable, not unduly discriminatory or preferential, and in the public interest," the standard of review applied to ERO submissions under the FPA.²⁸ The proposal falls short of the detailed technical information needed to make such a determination. The timely need to address reliability risks caused by the current BES definition—and indeed any reliability standard—must be balanced against the prospect that consumers will incur costs without justified reliability benefits.

Additionally, NERC's bifurcation of its work into two phases signals that the process for developing reliability standards can proceed down separate tracks, with the in-depth technical analysis that should provide the basis for a proposed requirement being performed *after* the standard is filed with the Commission. The Commission should clarify in this proceeding that the standard development process must provide a technical justification for a proposed reliability standard *before* NERC seeks Commission approval under Section 215 of the FPA. Indeed, this proceeding represents an important milestone in the "new paradigm" that Order 743 established

²⁷ *Petition of the North American Electric Reliability Corporation for Approval of a Revised Definition of "Bulk Electric System" in the NERC Glossary of Terms Used in Reliability Standards*, Docket No. RM12-6-000 (filed Jan. 25, 2012) at 46. *See also id.* at 49.

²⁸ 16 U.S.C. § 824o(d)(2) (2006). *See* Order 743-A at P 14.

for the interplay between NERC and the Commission and for how directives under Section 215(d)(5) of the FPA will be structured.²⁹ The Commission’s translation of this proposed rule into a final rule will further shape this paradigm and inform NERC’s standards development process. Accordingly, the Commission should decline to approve the revised BES definition absent a sufficient technical justification for the proposed changes.

3. No Cost-Benefit Analysis was Performed as Part of Developing the Revised Definition

The Mass DPU provided comments to NERC on the draft BES definition stating that a cost-benefit analysis should be integral not only to the development of the revised BES definition but in all standard development processes.³⁰ The Mass DPU supports NERC’s recent proposal to implement a Cost Effective Analysis Process (“CEAP”), which, going forward, would evaluate cost-effectiveness as part of the standards development process. As we noted in comments to NERC on the CEAP:

The Mass DPU, along with its fellow New England states, strives to ensure that the appropriate level of infrastructure is in place to achieve a robust and reliable bulk electric system. However, as NERC recognizes here, incremental reliability gains cannot be considered in a vacuum, separate from an understanding of the magnitude of risk and cost associated with federal reliability standards. NERC’s concurrent consideration of costs, reliability risks and benefits—as captured in the proposed CEAP—should help tailor the most appropriate and cost effective approach to achieving a reliability objective.³¹

²⁹ See June 21, 2012 Statement of Commissioner Cheryl A. LaFleur on NERC’s Revised Definition for Bulk Electric System, Docket Nos. 12-6-000 and 12-7-000 (“In my remarks at the time [Order No. 743 was issued], I observed that the Commission used Order No. 743 to establish a new paradigm for Commission directives under section 215(d)(5) of the Federal Power Act. The Commission explained that directives should not be unduly prescriptive, but should instead identify and explain the Commission’s reliability concerns, offer NERC guidance and suggestions as to acceptable solutions, and permit NERC to propose equally efficient and effective alternatives.”).

³⁰ See Comments of the Massachusetts Department of Public Utilities on the 2nd Draft of Definition of BES (Project 2010-17), Oct. 7, 2011, at 4, available at <http://www.mass.gov/eea/docs/dpu/regional-and-federal-affairs/ma-dpu-comments-on-2nd-draft-bes-oct07-2011.pdf>.

³¹ Massachusetts Department of Public Utilities, Response to Request for Comments Regarding the Draft NERC Cost Effective Analysis Process (CEAP), July 6, 2012, at 3, available at <http://www.mass.gov/eea/docs/dpu/regional-and-federal-affairs/nerc-ceap-jul06-2012.pdf>.

The development of the revised BES definition preceded the CEAP proposal and does not include a cost impact analysis that weighs costs related to the modified definition against the reliability benefits that the new definition would achieve.

The lack of a cost-benefit analysis accompanying the revised BES definition represents an additional gap in the process for developing this reliability standard. The CEAP, which we understand is still under development, will hopefully resolve this gap as future reliability standards are developed. However, given the significant costs that the revised BES definition could impose on consumers, the Commission should reject NERC's proposed modifications until they are supported by a cost-benefit analysis.

4. List of Inclusions and Exclusions

The Mass DPU supports the concept of a list of inclusions and exclusions to provide greater clarity to the core definition. Together with the exception process, this list should help mitigate the risk that the core BES definition will over-capture or under-capture system elements and facilities. The Mass DPU supports the comments NESCOE filed today regarding specific inclusions and exclusions, which are consistent with comments the Mass DPU filed with NERC during the BES definition development process.

B. Bulk Electric System Exception Process

The Commission proposes to approve NERC's changes to its ROP that establish a case-specific process for (i) *excluding* from the BES individual facilities or elements that are not necessary for the reliable operation of the interconnected transmission network, and (ii) *including* in the BES individual facilities or elements that are necessary for such reliable operation.³² The Mass DPU appreciates NERC's effort to establish a fair and efficient process for considering exceptions to the BES definition. However, there are areas where the proposed

³² NOPR at P 103.

changes place a premium on expediency over transparency and an opportunity to participate. Additionally, as detailed below, other revisions are needed to mitigate the risk that consumers will incur unnecessary costs. The Mass DPU provides below specific suggestions for correcting these shortcomings.

1. The ROP does not Accord States a Meaningful Opportunity to Participate in the Exceptions Process

The ROP should ensure that the states have an opportunity to participate actively in the exceptions process. Under the current proposed changes, state regulatory authorities are accorded the status of a third party and would not receive notice of an exception request or decisions made through the process or have a formal opportunity to comment at critical decision-making points. Such a process—or lack thereof—is an oversight. Exception requests will inevitably involve difficult questions regarding whether a facility is “used in the local distribution of electric energy,” an area over which states have exclusive authority under the FPA. State regulatory authorities can and should play a critical role in resolving these potentially complex jurisdictional issues. Accordingly, the Commission should not approve the ROP changes unless the following additional revisions are made:³³

- a) Section 4.5 of Appendix 5C should provide applicable state regulatory authorities with the same notice and access to information as planning authorities and other entities are provided. State personnel with appropriate clearance, such as Critical Energy Infrastructure Information access, could be designated for receipt of such information to preserve confidentiality.

³³ The Mass DPU offered these changes to NERC’s ROP drafting team, as did NESCOE. NERC’s ROP team has stated in response to comments regarding transparency and participation that “third parties (including state regulatory agencies) will have adequate opportunity to provide comments regarding the request without formally participating in the process.” *Petition of the North American Electric Reliability Corporation for Approval of Revisions to its Rules of Procedure to Adopt a Bulk Electric System Exception Procedure*, Docket No. RM12-7-000 (filed Jan. 25, 2012), at Attachment 9, p. 7. The drafting team also stated that “a procedure that encouraged or even only invited multi-party filings would unduly complicate the process without any concomitant benefit in reliability.” *Id.* The Mass DPU disagrees with these conclusory statements for the reasons provided herein.

- b) Section 5.2 of Appendix 5C, the Regional Entity’s substantive review of an exceptions request, should provide applicable state regulatory authorities an opportunity to comment.
- c) Applicable state regulatory authorities should be provided notice of a Regional Entity’s recommendation pursuant to Section 5.2.3 of Appendix 5C.
- d) Section 8 of Appendix 5C should provide applicable state regulatory authorities an opportunity to submit comments to NERC.
- e) Rule 1703 should provide states with a right to appeal NERC’s determination of BES exception requests.
- f) The ROP should include a mechanism for state regulatory authorities to initiate review of a facility’s classification. Because states may lack the detailed information required to request an exception, such a mechanism could require the state regulatory authority to request that the relevant Regional Entity undertake a review of the element or facility in question. Under this structure, there should also be an avenue for direct appeal to NERC if the Regional Entity declines to file the request.

Ultimately, implementation of the ROP will be the best test of the efficacy and transparency of the exceptions process. However, the additional modifications suggested above should help ensure that the process places the appropriate emphasis on transparency and participation. The Commission should not approve the ROP changes until NERC makes these further revisions.

2. Other Needed Enhancements to the ROP

The Commission should direct NERC to further revise the ROP to ensure that, absent an urgent reliability risk, asset owners are not required to implement a compliance schedule while an appeal to NERC’s determination is pending. Under the ROP changes, asset owners with an element or facility that is the subject of an exceptions request—whether inclusion or exclusion is sought—would be required by Section 10 of Appendix 5C to submit an implementation plan for complying with any applicable reliability standards.

At the same time, the ROP revisions establish an appeals process for an entity challenging NERC’s exception determination. An entity would be permitted under Rule 1703.3

of the ROP to seek review of NERC’s determination by NERC’s Board of Trustees Compliance Committee. The Board’s decision becomes the “final NERC decision” pursuant to Rule 1703.3 of the ROP. This final decision can then be appealed to the “Applicable Governmental Authority” pursuant to Rule 1703.4—e.g., FERC within the United States.³⁴ However, the proposed ROP changes are silent on whether an appeal of NERC’s determination would stay or otherwise affect the implementation plan. If asset owners are required to comply with an implementation plan before the appeals process established in the ROP is exhausted, consumers would be exposed to costs related to compliance expenditures that may not be necessary.

Additionally, during the process of developing changes to the ROP, the NERC ROP drafting team made revisions to its draft in response to comments that planning authorities and other entities, in addition to asset owners, should be permitted to submit an exception request. However, the changes made were limited to allowing these non-asset owners to submit solely a request to *include* a facility in the BES. Applications for *exclusion* would still be at the exclusive discretion of the asset owner. This asymmetry should be corrected. The Mass DPU cannot identify any reasonable basis for limiting requests for exclusion exceptions to asset owners. Planning authorities have the technical expertise to make a threshold determination on the merits of an exclusion exception, whether for inclusion or exclusion. Particularly given the inability of states under the proposed ROP to initiate an exception request, the Commission should direct NERC to revise the ROP further to allow, at minimum, relevant planning authorities to submit exclusion exception requests in addition to inclusion requests.

C. NERC List of Facilities Granted Exceptions

The Commission proposes to require that NERC make “an informational filing within 90 days of the effective date of a final rule, detailing its plans to maintain a list [of facilities that

³⁴ See Appendix 2 to the ROP (defining “Applicable Governmental Authority”).

have received exceptions] and how it will make this information available to the Commission, Regional Entities, and potentially to other interested persons.”³⁵ The Mass DPU supports this proposed requirement. To the extent it is included in any final rule, the Mass DPU asks the Commission to require that state regulatory authorities be allowed appropriate access to the list. A state should have ready access to the list of facilities within its borders that have been granted exceptions. As noted above, the FPA preserves state oversight over local distribution of electric energy, and to the extent local distribution facilities become classified as BES or are removed from BES designation, this information must be made available to the states.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Mass DPU hereby respectfully requests that the Commission reject NERC’s proposal and direct NERC to take additional actions consistent with the comments provided above.

Respectfully submitted,
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³⁵ NOPR at P 123.